United States Court of Appeals for the Second Circuit



PETITION FOR REHEARING EN BANC

76-1495

To be submitted

In the United States Court of Appeals

For the Second Circuit

INDEX # 76-1495

UNITED STATES OF AMERICA

Plaintiff-Appelle,

-against-

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DIMATTEO, SAVERINO CARRARA, MICHAEL De-LUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO

Defendants- Appellants.

BAS

PETITION FOR REHEARING -- REHEARING IN BANC.

RICHARDS W. HANNAH Attorny for the Appellant Anthony Di Matteo 26 Broadway New York, New York 10004 (212) Wh itehall 3-8870



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IN THE UNITED STATE COURT OF APPEALS SECOND CIRCUIT Nos.909,910,911,912,913,914,915,916,917

No 911, September Term 1976

Dockets No.76-1495, 1501, 1509,1519, 1529,1535 1536, 1537, 1540.

UNITED STATES OF AMERICA,

Appellee,

76- 1495

-against-

EUGENE SCAFIDI, RAPIO MASCITTI, ANTHONY DIMATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, Jr., JAMES V. NAPOLI, Sr., ROBERT VOULO, and SABATO VIGORITO,

Appelllants.

PETITION FOR REHEARING

PETITION FOR REHEARING IN BANC.

To: The Honorable Judges of the United States Court of Appeals for the Second Circuit.

Anthony DiMatteo, the defendant-appellant above named, presents this petiton for a rehearing of the decision by the Court of his conviction dated October 13, 1977 pursuant to Rule 40 of the Federal Rules of Appellate Procedure and suggests a rehearing in Banc by the active Judges of this Court pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

PRELIINARY STATEMENT

On October 13, 1977 by a divided panel this Court affirmed the conviction of Anthony DiMatteo for conducting illegal gambling businesses in violation of 18 U.S.C. secition 1955.

There were three opinions rendered: an opinion by Judge Moore for affirmance. A concurring opinion by Judge Gurfein and a dissenting opinion by Judge Smith.

The issues raised by DiMatteo concerned the interpretation of 18 U.S.C. section 2510 et seq., to wit: Whether (1) a surreptitious entry into an apartment numbered 309 required an order of the Court either in the interception order or in a separate entry order; (2) whether the interceptions were carried out in conformity with the order (3) whether the sealing of the tapes was timely (4) whether the reports to the Judges were timely (5) whether the inventory was served timely on DiMatteo (6) how DiMatteo was named in the order after the Attorney General struck it from the authorization (6) whether DiMatteo was known to the government but not named in the order and whether DiMatteo has standing which the Courtedid not decide because it stated that it was not necessary for this appeal. All of these issues were decided against DiMatteo by Judges Moore and Gurfein, except as to the issue of standing. Judge Smith in his dissent recommended reversal and for a retrial as to all defendants with all evidence obtained by electronic surveillance after warrantless surreptitous entried surpressed.

It is submitted that the majority opinions place a construction upon section 2510 et seq. of the statute and the Fourth Amendment which is contrary to the intent of Congress, contrary to the decisions of the Supreme Court as to a surreptious entry into a private home or apartment and is contrary to public policy. The conclusion reached by the Court transcends any other case decided in any other circuit. For this reason this petition for a rehearing is sought with the suggestion that the appeal be heard in Banc since the issue is most important. There is a division between this Circuit and the Court of Appeals of the District of Columbia, The Fourth Circuit and Eighth Circuit. Moreover, Judge Gurfein in his concurring opinion suggests that Congress act upon the question. He further suggests that until the Supreme Court speaks that a general direction for forcible or surreptitous entry be made part of the interception order.

POINT 1.

The Majority Opinions Have Extended the

Rights of the Government to Surreptitously

Enter Upon Private Property In Violation of
the Statute and the Constitution.

In 1968 Congress passed legislation which prohibited wire tapping without a Court order. The statute set forth strict limitations and requirements before the Court could order electronic surveillance via interceptions. It interposed a Judge between the

government and the prospective person to be intercepted. Only after certain requirements of the statute were complied with could the Judges order oral or wire interceptions to be commenced. In the particular orders involved in the instant case one of the persons named had to be present in the premises (here an apertment). In the instant case in neither the application nor at the presentation of Application to Judge Judd , Judge Weinstein or Judge Rosling was anything stated about a surreptitous entry into an apartment. However, this Court has held, as did the Trial Judge that the order of interception impliedly gave the right to the government to enter surreptitously into apartment 309 to install the "bug" or "bugs" and that the entry was neither a violation of 18 U.S.C. 2510 et seq. or the Fourth amendment.

It is submitted that no other Circuit Courts have adopted this view.

DE MATTEO ADOPTS THE PETITION OF JAMES

NAPOLI, SR. AS THE APPLICABLE ARGUMENTS ON THE ISSUE OF THE

SURREPTITOUS ENTRY.

It is submitted that the Court overlooked these imprtant points.

POINT II

SEALING IS AN IMPORTANT REQUIREMENT OF THE STATUTE.

It is submitted that the court overlooked this important requirement when it is held that the tapes were sealed in compliance with the statute. The dissent did not so hold. Here there was a 23 day delay in sealing the tapes on Apt. 309 T.

The statute 180.S.C. sec. 2518 (8) requires that the tapes be presented for judicial sealing "immediately" upon the expiration of the authorizing order. This is an integral part of this statutory scheme and was intended to insure that accurate records were kept of the intercepted communications. This is part and parcel of the Congressional plan to limit the use of intercepted procedures to situations clearly calling for the employment of this extraordinary investigative device. Moreover it plays a central role in the statutory scheme. This is substantially the language of Chief Judge Kaufman in U.S. v. Gigante, 538 Fed.502. (2 Cir. 1976).

Therefore, unless the tapes are sealed immediately upon the expiration of the order, the statute is violated and suppression can result. The government offered excuses, which were accepted by the Trial Judge and this court.

It was also claimed that there were extensions of the original order, which extended the time for the sealing.

It is submitted that the court overlooked the weaknesses of the excuses of the Government for the delay, none of which had any merit.

It is also submitted that the court should not have taken a position contrary to the wording in the orders and construing them to be extensions of the original order. This comment is applied especially to Apt. 309 $\overline{\text{II}}$ and 309 $\overline{\text{III}}$. If the Government chose to treat these orders as separate and distinct, which it did the court should have accepted its position. If this had not been done, there would have been a delay of 23 days in the sealing of Apt. 309 $\overline{\text{I}}$ with inadequate excuses for the delay. Therefore, since the order for 309 $\overline{\text{I}}$ was the foundation for the entire prosecution and the subsequent orders, suppression of all the order would occur as fruits of the poisonous tree.

The vice in the courts position is that sealing can be delayed indefinitely - here there could have been a delay of about two and a half months in Apt. $309\ \underline{I}$, if the courts view is carried out. However, if extended further, there can be an expiration, then a period of time before the new order is granted - then the period of the order - then another interval - then another order then the period of the order and its expiration and the delay could add up to months before the taper on the first order were sealed. This procedure defeats the very purpose of the sealing, which is to insure the integrity of the tapes and that is why the word "immediately" is used. Moreover, no single tape in this proceeding was filed on time - the delay ranged for 3 to 23 days on the tapes of the five orders.

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CONCLUSION

It is Suggested that a Hearing In Banc

Be Ordered Since the Question Involved is

Of Exceptional importance.

The issue presented is of exceptional importance because (1) there is a difference in decisions in court Circuits; (2) the defendants and the government should know how to proceed and (3) the issue is of such importance that Judge Gurfein suggested that a clause permitting surreptitious entry be inserted in every order where it is contemplated until Congress acts on the issue.

Appellant respectfully prays that the petition for a rehearing and a hearing in banc be granted.

Respectfully submitted:

Respectfully submitted:

RICHARDS W. HANNAH

Attorney for the Appellant

Anthony Di Matteo

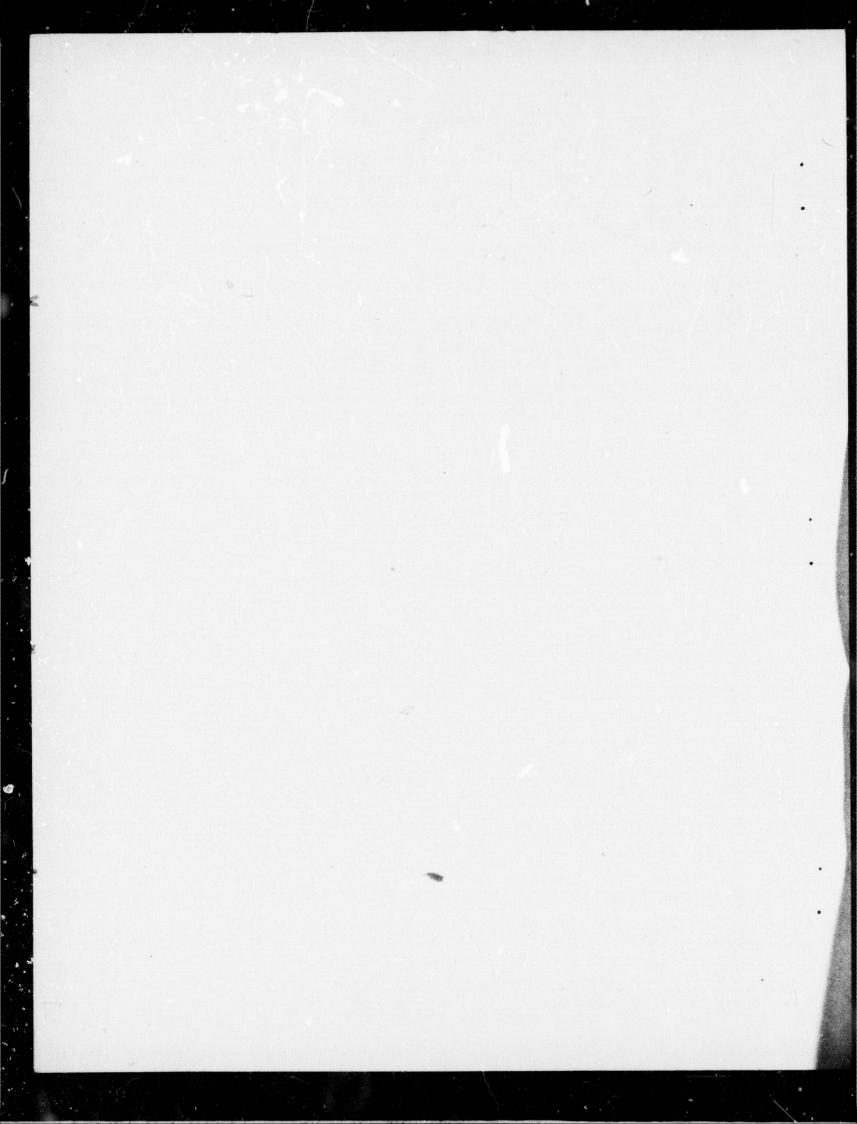
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CERTIFICATE OF COUNSEL

I, RICHARDS W. HANNAH, attorney for Anthony Di Matteo, do hereby certify that the foregoing petition for a rehearing and a rehearing in banc of this cause is presented in good faith and not for the purpose of delay.

Michards W. Hannah



AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York: ss.

RICHARDS W. HANNAH being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 586 Fourth Street, Brooklyn, New York, that on 27 day of October, 1977 deponent served the within petition upon, Albert J. Brackley, Esq., Attorney for Appellant, Michael DeLuca 186 Joralemon Street, Brooklyn, New York 11201.,

Dominick DiCarlo, Esq., Attorney for Appellant, Robert Voulo, Robert Voulo, 66 Court Street, Brooklyn, New York 11201,

David Gottlie's, Esq., Federal Defender Services Unit, Attorney for Appellant, Bario Mascitti, United States Courthouse, Room 509, Foley Square, New York, New York 10007.,

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Michael E. Moore, Esq., c/o T. George Gelinsky, P.O. Box 898 Ben Franklin Station, Washington, D.C. 20044.

at the addresses designated by said attorneys for that purpose by depositing a true copy of the same enclosed in a postpaid, properly addressed wrapper, in a official depository under the exclusive care and custody of the United States Postal Service within the

State of New York.
Sworn to before me actober 27,1977

RICHARDS W HANNAH

John John